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JAMES H. McKENNEY, Clerk.

Supreme Court of the United States.

OCTOBER TERM, 1902.

No. 137.

EDWARD H. PARDEE, ET AL.,
Plaintiffs in Error,

vs.

A. D. ALDRIDGE, ET AL.,
Defendants in Error.

IN ERROR TO THE COURT OF CIVIL APPEALS FOR THE FIFTH SUPREME JUDICIAL DISTRICT OF TEXAS.

BRIEF FOR PLAINTIFFS IN ERROR.

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MAXWELL EVARTS,
Counsel for Plaintiffs in Error.

S. G. Simmons, 74 Nassau and Cedar streets, N. Y.

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Statement.

This is an action of trespass to try title instituted in one of the District Courts of Dallas county, Texas, by A. D. Aldridge, A. F. Hardie and W. G. Mowry purporting to be trustees for "J. E. Downes and associates," against Edward H. Pardee and Collis P. Huntington to recover a

twenty-five acre tract of land situated in the City of Dallas and commonly referred to as the "Hughes and Slaughter tract"; a tract of 11.92 acres near the City of Dallas commonly referred to as the "Mayes tract"; certain unused lots and blocks in the villages of Kemp and Crandall; and several different tracts of unimproved land situated in the counties of Dallas, Kaufman and Houston, all of which had previously belonged to the Texas Trunk Railroad Company, through which both parties claim (R. 1–7).

The several tracts of unimproved land were situated remotely from the railroad of said company; and none of said tracts nor any of the lots and blocks in Kemp and Crandall had been used or were so situated as to be capable of use in the maintenance or operation of the railroad, but the same had been given to the company, as originally organized, by different individuals to aid or encourage the construction of the railroad, and not for occupation or use for railroad purposes. The only property involved in this suit that was acquired or used by said company in the construction or operation of its railroad was the Hughes and Slaughter tract and the Mayes tract.

The Hughes and Slaughter tract of twenty-five acres is situated in what was at the time of its purchase in 1880 the town of East Dallas, but what is now the City of Dallas. On account of the growth of the city and the improvement of the property around it, it has since increased enormously in value and is now probably worth at least Fifty Thousand Dollars. It is the only property in the City of Dallas, the terminus of the line, that was ever owned by the Texas Trunk Railroad Company. Soon after its incorporation the company purchased the tract for terminal purposes, projected its line from it, constructed its main track across it; and it has ever since been held and used for such purposes, as far as the condition of the company permitted. The Mayes tract contained a sand bank and other material adapted to the construction and ballasting of the line, and has ever since been used as the supply for material required in ballasting the track. The controversy in this court is over the "Hughes and Slaughter tract" and the "Mayes tract" only.

The Texas Trunk Railroad Company was agreed upon as the common source of title (R. 75) —plaintiff in error claiming through certain

foreclosure proceedings in the Circuit Court of the United States for the Northern District of Texas against said railroad company, and defendants in error claiming through certain execution sales against the railroad company and through transfers made by some of its directors.

Most of the facts were agreed upon in writing by the parties (R. 75–124), and such evidence as was adduced was without conflict.

Claim of Plaintiffs in Error.

The Texas Trunk Railroad Company was incorporated under the general laws of Texas November 6th, 1879, for the purpose of constructing and operating a line of railway from the City of Dallas to the Gulf of Mexico at or near Sabine Pass, with a branch line to the Sabine River,—the length of the proposed line in all being about 350 miles (R. 76–78). Promptly upon its organization the company proceeded with the construction of its line, and by the latter part of 1881 had extended it from the City of Dallas and put it in operation for a distance of about forty miles, and had other portions under construction. On March 22nd, 1880, the railroad company executed to the International

Trust Company of Boston, as trustee, a mortgage in the usual form to secure a series of bonds to be issued from time to time against its line as different sections thereof should be completed (R. 79–80). A considerable number of such bonds, aggregating a large amount, were issued, negotiated and sold by the company.

In December, 1881, the railroad company became involved in financial difficulties. It defaulted in the payment of interest upon its bonds and numerous suits, mostly for small amounts due for labor performed and material furnished in the construction of the line, were commenced against the company in the courts of Dallas and Kaufman counties. In one of such suits a receiver of all the property and assets of the company was appointed by the District Court of Kaufman county on December 5th, 1881 (R. 81). Subsequently the holders of certain bonds of the company secured by the mortgage to the International Trust Company intervened in that suit and procured its removal into the Circuit Court of the United States for the Northern District of Texas, at Dallas, when the International Trust Company appeared and by leave of that court became the complainant in the suit and as such

it filed a bill for the foreclosure of the mortgage given to it to secure the bonds of the railroad company (R. 81–82). After the removal of the suit into the Federal Court the Receiver of the District Court of Kaufman County resigned and the Federal Court appointed another Receiver in the cause.

On January 31st, 1883, the foreclosure proceeding came on for final hearing in the Circuit Court, when a decree was rendered foreclosing the mortgage of March 22nd, 1880, executed by the railroad company to the International Trust Company and directing the sale of the property covered thereby (R. 82–83). The sale was made pursuant to the decree on May 1st, 1883, and the property was bought by M. F. Dickson and associates, as purchasing trustees; and the sale was in due time confirmed by the court (R. 83). The decree of confirmation, however, required the purchasers to pay into the court, when ordered so to do, such amounts as should be found necessary to satisfy certain costs and claims remaining to be determined, and provided that in case of failure to pay such amounts after certain notice the clerk of the court should issue to the marshal an order to re-sell the property.

In the meantime, however, upon confirmation of the sale, the property was conveyed to the purchasers and they were let into possession, but subject to the conditions of the decree of confirmation. Thereupon Dickson and associates, as such purchasers, reorganized under the original charter of the railroad company as authorized by a provision of the statutes of Texas which now appears as Article 4549, R. S., 1895, and reads as follows:

> "In case of the sale of the entire roadbed, track, franchise and chartered right of a railroad company, whether by virtue of an execution, order of sale, deed of trust or any other power, the purchaser or purchasers at such sale and their associates, shall be entitled to have and exercise all the powers, privileges and franchises granted to said company by its charter, or by virtue of the general laws; and the said purchaser or purchasers and their associates shall be deemed and taken to be the true owners of said charter and corporators under the same, and vested with all the powers, rights, privileges and benefits thereof, in the same manner and to the same extent as if they were the original corporators of said company; and

shall have power to construct, complete, equip and work the road upon the same terms and under the same conditions and restrictions as are imposed by their charter and the general laws." (*H. & T. C. R. Co. vs. Shirley, 54 Texas, 125; Acres vs. Moyne, 59 Texas, 623.*)

The reorganized company promptly entered into a contract for the completion of the line to Cedar—a point upwards of fifty miles from Dallas—and the road was put in operation to that point in November, 1883. The Company failed, however, to pay the obligations executed for the work, whereupon on May 18th, 1885, the holders of such obligations recovered judgment against it in the Dallas County District Court, for about One Hundred and Fifty Thousand Dollars. The company also failed to pay certain costs and claims established by the Federal Court in the foreclosure proceeding when ordered so to do by that court, as a result of which the clerk of that court issued to the marshal orders directing the re-sale of the property as provided by the court in the decree confirming the sale. Execution was also issued out of the State Court upon the judgment against the reorganized company for

the amount due under the construction contract just mentioned. The sheriff levied the execution upon the railroad and its appurtenances and upon all the land in controversy and sold the same on July 7th, 1885, at public auction to J. E. Schneider, W. J. Keller and J. E. Henderson. The marshal levied the orders of sale issued to him out of the Federal Court upon the same property, and on October 6th, 1885, sold it at public auction to the same parties who had previously purchased at the sheriff's sale (R. 86–88). The Hughes and Slaughter tract and the Mayes tract were particularly described by metes and bounds in the levy made by the sheriff, and in his deed to Schneider and associates (R. 86); and it was evident that the purpose was to levy the execution upon and sell everything to which the Texas Trunk Railroad Company as originally organized or as then existing had any claim of title. The marshal, however, in his levy did not particularly describe the lands, but seized and sold "the entire railroad, roadbed, depots, depot grounds, offices, shops, and all other property of every description thereunto belonging," etc. (R. 88).

J. E. Schneider and his associates, who purchased the property at such sales by the sheriff

and marshal, thereupon reorganized the company again under its original charter as authorized by Article 4549 of the Revised Statutes above quoted; and the company, as thus organized, continued to own the property until finally dissolved as hereinafter stated. The railroad company, as thus for the second time reorganized, on August 30th, 1888, executed to the Central Trust Company of New York, as trustee, a mortgage in the usual form to secure an issue of bonds aggregating the principal sum of One Million Dollars (R. 89–90).

But the ill fortune of the enterprise continued and the title to the property was clouded by litigation. Prior to the foreclosure of the mortgage to the International Trust Company and the sale thereunder in 1883, a large number of judgments, but for small amounts as a rule, had been rendered against the company in the courts of Dallas County in suits commenced before or about the time of the appointment of the first receiver in December, 1881 (R. 106–108). Upon some of such judgments executions were quietly issued and levied upon the railroad with its appurtenances (including the Hughes and Slaughter tract and the Mayes tract by specific description)

and sale thereof pursuant to such levy was made October 7th, 1886, and the property was bought by E. M. Powell and associates (R. 109–111), who thereafter asserted title and from time to time brought suits for its recovery and thus harried the company with litigation without ever bringing any of such suits to trial. Most of those familiar with the title considered such suits without merit because the execution sales through which Powell and associates claimed were made long subsequent to the foreclosure of the International Trust Company mortgage and the sale thereunder which had vested the title in the reorganized company. But by such means the company was discredited and was unable to secure the funds necessary to complete the line or to properly maintain and operate that portion which had been constructed.

The property being involved in litigation and the company being without means to properly maintain and repair it, or, at any rate, failing to do so, had got into such a condition and the track became worn and run down to such an extent that the road could not be safely operated and the company could not adequately perform its public duties as a carrier. Upon these grounds the

Attorney General of Texas, on September 25th, 1889, presented in the Dallas County District Court an information in the nature of *quo warranto* praying the forfeiture of the charter of the company and for the appointment of a receiver to operate its line. A receiver was promptly appointed to operate the property pending final hearing, but upon change of the venue of the cause to the Ellis County District Court, the latter court, in November, 1889, held that a receiver should not have been appointed in such a proceeding before final hearing, and thereupon discharged the receiver and returned the property to the company (R. 91).

The railroad company made default in paying the interest due upon the bonds secured by the mortgage of August 30th, 1888, executed by it to the Central Trust Company, as trustee; and on September 4th, 1891, the Trust Company commenced proceedings in the Circuit Court of the United States for the Northern District of Texas for the foreclosure of the mortgage; and on the same day a receiver was appointed by that court to take possession of and operate the property pending the foreclosure (R. 94-95). A few days later, *i. e.* September 14th, 1891, the *quo warranto*

proceeding came on for final hearing in the Ellis County District Court, when a decree was rendered forfeiting the charter of the company and appointing John H. Gaston as receiver to wind up its affairs, and with power and authority to sue and be sued and to take all such legal proceedings as should be deemed necessary to get possession of the property and assets of the company (R. 92–93).

The dissolution by said decree of the railroad company being ground for abating the foreclosure proceeding of the Central Trust Company (*National Bank vs. Colby, 21 Wall., 609; Life Association vs. Goode, 71 Texas, 90*) that company proceeded in due time to file in its foreclosure proceeding in the Federal Court a Bill of Revivor against Gaston, as receiver of the dissolved Railroad Company under appointment of the Ellis county District Court; and the suit was revived against him as the legal representative of the dissolved corporation under the Texas statutes (R. 97, 98). Such foreclosure proceeding came on for final hearing in the Federal Court on February 26th, 1895, when a decree was rendered foreclosing the mortgage executed by the railroad company on August 30th, 1888,

to the Central Trust Company and directing the sale of the mortgaged property (R. 98, 158–165). The property was sold pursuant to the decree on August 27th, 1895, when it was purchased by plaintiff in error, Edward H. Pardee, for himself and his co-plaintiff Collis P. Huntington; and the sale thus made was duly confirmed (R. 98). Pursuant to decree entered March 16th, 1896 (R. 99), Pardee satisfied the balance of his bid, and on April 9th, 1896, the property was duly conveyed to him by deed executed by the Special Master Commissioner appointed to make the sale; by John H. Gaston, as receiver of the Ellis county District Court, the representative of the dissolved mortgagor; and by George T. Atkins, the receiver of the Federal Court in the foreclosure proceeding, who was directed by the decree of foreclosure to join in the deed and convey any property standing in his name or to which he had in any manner acquired title (R. 100–103).

The enterprise having been wrecked by past contentions respecting the title of the property, it seemed best for every legitimate interest that the title should be cleared, if possible, and that this should be accomplished before the sale of the property in the pending foreclosure proceed-

ings in order that its value might not be depreciated on account of the conflicting claims. E. M. Powell and associates, who had purchased in 1886 at the sale made under the old judgments in the state courts (R. 106–111), were the only persons openly asserting title adverse to the reorganized railroad company and the holders of its bonds. In order to cancel and remove such claims as a cloud upon the title and to clear up the title George T. Atkins, the receiver of the Federal Court, in the suit for the foreclosure of the Central Trust Company mortgage, by leave of Court, on January 13th, 1894, filed a bill in that Court against E. M. Powell and associates, all of whom were named as defendants, which suit was styled "George T. Atkins, Receiver, etc., vs. C. T. Campbell, et al," and was numbered 275 upon the equity docket (R. 111–112). The property specifically involved was the line of railroad and the Hughes and Slaughter tract and the Mayes tract. The case was hotly contested, the main contention of the defendants being, as the contention of the defendants in error in this case is, that the mortgage to the International Trust Company and the decree foreclosing the same in 1883 did

not embrace the Hughes and Slaughter tract or the Mayes tract. Much evidence upon this question and others was taken, and upon final hearing a decree was rendered on July 16th, 1895, sustaining the contention of the receiver, and canceling the claim of Powell and associates as a cloud upon the title of the receiver and those represented by him—*the court thereby adjudicating that the Hughes and Slaughter tract and the Mayes tract were covered by the original mortgage and decree of foreclosure in 1883 whereby the title of the railroad company had been divested prior to the execution sales against it through which defendants claim* (R. 112–113). As already indicated, George T. Atkins, the receiver in said cause, in obedience to the requirement of the decree of foreclosure, joined the Master Commissioner and specifically conveyed to Pardee all the rights established or arising under the decree in favor of said receiver in said suit of George T. Atkins, Receiver, etc., vs. C. T. Campbell, et al. (R. 100–103).

Afterward E. M. Powell and associates released or conveyed to plaintiff in error, Pardee, all claim to or interest in the property in controversy (R. 113-114).

Claim of Defendants in Error.

A number of debts, generally for small amounts due by the Texas Trunk Railroad Company, were left unsatisfied upon the sale of its railroad and other property under the foreclosure of the mortgage to the International Trust Company in 1883. Most of them were reduced to judgment in the county and district courts of Dallas county in suits commenced prior to the foreclosure. Many years after the foreclosure sale and the several reorganizations of the company and when most of the judgments were dormant and the other claims barred by limitation a number of such claims got into the hands of Messrs. Dickson & Moroney, a firm of attorneys at Dallas, for collection. They controlled claims against the reorganized company which executed the mortgage to the Central Trust Company, as well as against the original company that executed the mortgage to the International Trust Company. In view of this conflict said attorneys advised their clients to pool their interests in the venture, which said attorneys were to undertake, with trustees to be selected to act as plaintiffs in this suit (R. 135–138).

Among the claims against the company as

originally existing was one involved in a suit filed November 4th, 1881, by W. F. Thompson vs. Texas Trunk Railroad Company in the Dallas county District Court in which there was a judgment rendered March 15th, 1887, (R. 114–116). Such judgment was one of the claims that came into the hands of Dickson & Moroney. On March 9th, 1895, some eight years after the judgment was rendered, said attorneys caused an execution to be issued thereon and at the same time levied upon the Hughes and Slaughter tract, the Mayes tract and other lands in Dallas county, and the same was sold under such levy on April 2nd, 1895, for $2,350 to C. C. Bumpas, "trustee for I. E. Downes and associates." Another execution was issued on the judgment August 30th, 1895, and levied upon the land in Houston county, which, on September 6th, was sold to C. C. Bumpas, as such trustee, for $150 (R. 116). Bumpas was a stenographer in the office of Dickson & Moroney.

Bumpas thereupon commenced an action of trespass to try title for the recovery of said lands against the surviving members of the Board of Directors of the original Texas Trunk Railroad Company in office at the time of the foreclosure

sale against that company in 1883; and John H. Gaston, receiver of the Ellis County District Court, was also made a party defendant. Neither the receiver of the Federal Court in the foreclosure proceeding, who was in possession of the property, nor plaintiffs in error were made parties to such suit, nor had they any notice whatever of any such proceeding, or of plaintiff's claim until this suit was commenced. Such board of directors consisted of nine members, but all except four were dead,—those living being John F. Ely, James B. Simpson, D. A. Robinson and W. L. Cabell (R. 121). A provision of the statutes of Texas in force at the time, and now appearing as Article 4555 Revised Statutes 1895, reads as follows:

> "Whenever a sale of the roadbed, track, franchise and chartered powers and privileges is made as hereinbefore provided (unless other persons shall be appointed by the legislature or by some court of competent authority), the directors or managers of the sold out company at the time of the sale, by whatever name they may be known in law, shall be the trustees of the creditors and stockholders of the sold out company, and

shall have full powers to settle the affairs of the sold out company, collect and pay the outstanding debts, and divide among the stockholders the money and other property that shall remain after the payment of the debts and other necessary expenses; and the persons so constituted trustees shall have authority to sue by the name of the trustees of such sold out company, and may be sued as such, and shall be jointly and severally responsible to the creditors and stockholders of such company, to the extent of its property and effects that shall come to their hands."

No defense whatever was made to the suit thus brought against them by Bumpas by the surviving directors, and it was obviously collusive. Simpson, one of the directors, testified that he acted as attorney for the defendants in the case and made no defense (R. 134–135). He was, moreover, one of the creditors in whose interest the suit was being prosecuted. W. L. Cabell, another of the defendant directors, was also a creditor similarly interested with the plaintiff (R. 130–132). So was the defendant Robinson (R. 136). It does not appear that the remaining defendant director, Ely, was interested in the

Bumpas suit against him. Gaston, receiver, filed an answer, but his attorneys did not attend upon the trial but made an agreement with plaintiff as to certain facts (R. 137).

Of course the suit under such circumstances resulted in a judgment in favor of Bumpas, as trustee (R. 116–118). Subsequently Simpson, Ely, Robinson and Cabell, the four surviving directors, purporting to act as trustees of the Texas Trunk Railroad Company (all of whom except Ely, and probably Ely also, were among the creditors represented by Bumpas, as trustee). executed a deed conveying the property in quession to Bumpas, as such trustee (R. 120). Bumpas afterwards relinquished his trusteeship by conveying the property to the defendants in error, Aldridge, Hardie and Mowry (R. 121–122), who, according to the allegations of their petition, have brought and are prosecuting this suit "under the direction of Dickson & Moroney, who, as attorneys for J. E. Downes and associates, are authorized to direct said trustees in the recovery, by suit or otherwise, of any of said property," (R. 1–2).

It appears, therefore, that defendants in error claim under the Texas Trunk Railroad Company, as originally existing, through an execution sale against it many years after the foreclosure sale in the Federal Court in 1883, and the consequent dissolution of the railroad company, and under deeds made by four out of a board of nine directors, three of whom at least were personally interested in the scheme in furtherance of which the deed was executed.

Plaintiffs in error contested in the state courts the title to the property involving other than the Hughes and Slaughter tract and the Mayes tract because of the apparent insufficiency of plaintiffs' *prima facie* title, rather than upon the strength of their own title, since, as already indicated, none of the property except the Hughes & Slaughter tract and the Mayes tract was ever used, or was capable of use, in connection with the operation of the railroad, and had not been acquired for any such purpose, but had been donated to the company to encourage the construction of its road.

But the Hughes and Slaughter tract and the Mayes tract had been bought by the company

for railroad purposes, had been ever afterward used by it for railroad purposes and were absolutely necessary for such railroad purposes. They passed with the railroad into the possession of the purchasers at the sale made upon the foreclosure of the mortgage to the International Trust Company in 1883, and had always followed the possession of the railroad through the different organizations and receiverships subsequently and had been used in connection therewith. They had been in the possession of the receivers of the Federal Court in both of the foreclosure proceedings in that court, and such receivers had regularly assessed and paid the taxes thereon with the other railroad property in their hands. Plaintiffs in error specially set up the proceedings of the Federal Court in the foreclosure suits and the decrees therein and claimed that the effect thereof was to vest the title to said property in them and those through whom they claimed.

Of course if the property was embraced in the decrees foreclosing the mortgages of the Texas Trunk Railroad Company, defendants in error have no title, since such decrees necessarily cut off the railroad company through and under

which they claim; and defendants in error can have no greater right than the railroad company could have. Manifestly, if the Texas Trunk Railroad Company, as it originally existed, could not have recovered this property of the reorganized company, or of plaintiffs in error, then defendants in error cannot do so. The question, therefore, in this court is whether the foreclosure decrees embrace the two tracts in controversy.

After introducing upon the trial the decrees (R. 152–165) and other proceedings of the Federal Court in the foreclosure suits (R. 82–84, 98–99) plaintiffs in error specially requested the court in several different forms to instruct the jury that such proceedings and decrees were effectual to vest the plaintiffs in error, or those under whom they claim with title to the property in question, and that a verdict should be returned accordingly, but such charges were refused (R. 34–36), and the action of the court was duly assigned as error—a specific exception to the ruling in such case being unnecessary under the provisions of Article 1320, R. S. 1895, providing that,

"When the instructions asked, or some

> of them, are refused * * * such instructions shall be filed with the clerk, and shall constitute a part of the record of the cause, subject to revision for error without the necessity of taking any bill of exception thereto."

They also requested the court, by special charge No. 12 (R. 36–37), to instruct the jury that the decree of the Federal Court in the suit of Atkins, as receiver of said court, against C. T. Campbell et al., was effectual to establish and bring into the custody of said court through said receiver in the foreclosure suit the two tracts of land in question, but such charge was also refused.

The Judgment.

The court instructed the jury peremptorily to return a verdict in favor of plaintiffs for all the property sued for except the Hughes & Slaughter tract and the Mayes tract (R. 17–19). As to those two tracts, although there was no conflict in the evidence, the court submitted special issues, but in view of the undisputed facts instructed the jury peremptorily what their finding should be on all the material points, but leaving them free, however, to make findings upon various

special issues submitted at the request of counsel for defendants in error (R. 19–23). Upon the return of the verdict both parties moved for judgment (R. 39–40) and upon the uncontroverted facts the court held as matter of law that plaintiffs in error were entitled to the Hughes and Slaughter tract and the Mayes tract and accordingly rendered judgment in their favor for those two tracts and in favor of defendant in error for all the other land sued for (R. 40–53).

Both parties appealed to the Court of Civil Appeals (R. 174–196), by which court so much of the judgment as was in favor of defendants in error was affirmed, and so much thereof as awarded the Hughes and Slaughter tract and the Mayes tract to plaintiffs in error was reversed and judgment therefor was rendered in favor of defendants in error (R. 210–211). Plaintiffs in error moved for a rehearing, which was overruled (R. 227), and then applied to the Supreme Court of Texas for a writ of error, which was denied (R. 227). Collis P. Huntington died after judgment in the District Court, and Arabella D. Huntington, Charles H. Tweed and Isaac E. Gates, as executrix and executors of his last will and testament, joined plaintiff in error, Edward H.

Pardee, in applying for a writ of error from this court to the Court of Civil Appeals, which was duly allowed by the Chief Justice of that court.

Assignment of Errors.

The Court of Civil Appeals erred:

FIRST. In deciding that the decrees of the Circuit Court of the United States foreclosing the mortgage of the Texas Trunk Railroad Company to the International Trust Company did not embrace the so-called "Hughes & Slaughter" tract of land, and in thereby denying due effect to said decrees.

SECOND. In deciding that the decrees of the Circuit Court of the United States foreclosing the mortgage of the Texas Trunk Railroad Company to the International Trust Company did not embrace the so-called "Mayes" tract of land, and in thereby denying due effect to said decrees.

THIRD. In deciding that the decrees of the Circuit Court of the United States foreclosing the mortgage of the Texas Trunk Railroad Company to the Central Trust Company did not embrace the so-called "Hughes and Slaughter" tract of land, and in thereby denying due effect to said decrees.

FOURTH. In deciding that the decrees of the Circuit Court of the United States foreclosing the mortgage of the Texas Trunk Railroad Company to the Central Trust Company did not embrace the so-called "Mayes" tract of land, and in thereby giving due effect to said decrees.

FIFTH. In not deciding that the decree of the Circuit Court of the United States for the Northern District of Texas, rendered July 16, 1895, in cause No. 275 upon its Equity Docket in favor of George T. Atkins, as Receiver, etc., against C. T. Campbell, *et al.*, was effectual to establish and bring into the custody of said court, through said Atkins, as Receiver in cause No. 193 upon its Equity Docket, the "Hughes and Slaughter" tract and the "Mayes" tract, and that the sales through which defendants in error claim were void because made while said property was so in legal custody.

SIXTH. In reversing the judgment of the District Court in so far as it was in favor of said Pardee and Huntington and in rendering judgment against them for said two tracts of land and in not rendering judgment in their favor therefor.

ARGUMENT.

FIRST POINT.

Plaintiffs in error having specially set up the decrees of the Circuit Court of the United States in the foreclosure proceedings as a defense to the action, and the evidence upon the issue being without conflict, this court has jurisdiction and power to determine whether due effect was denied to such decrees by the decision of the State Court that they did not embrace the property in controversy.

We have seen that plaintiffs in error introduced the decrees and other proceedings of the Circuit Court of the United States in the suits for the foreclosure of the mortgage of the Texas Trunk Railroad Company, as it originally existed, to the International Trust Company, and the mortgage of said railroad company, as reorganized, to the Central Trust Company and specially claimed, when offering said evidence, that said proceedings and decrees were effectual to divest said railroad company of the title to the property in controversy and to vest the same in plaintiffs in error and those through whom they claim (R. 150–165); and that they also specially re-

quested the court to so instruct the jury, and that such requests were refused (R. 34–37). While the District Court, when it came to enter judgment, held with plaintiffs in error upon this point and ruled that said decrees did embrace the Hughes & Slaughter tract and the Mayes tract (R. 166–173), yet the Court of Civil Appeals reversed such judgment and held directly to the contrary (R. 199). It is entirely clear, therefore, that this court has jurisdiction to inquire and determine whether by such judgment of the Court of Civil Appeals due effect has been denied to the decrees of the Circuit Court in the foreclosure proceedings, *Dupasseur vs. Rochereau*, *21 Wall.*, *130*, *134*; *Embry vs. Palmer*, *107 U. S.*, *3*; *Crescent Live Stock Co. vs. Butchers Union*, *120 U. S.*, *141*, *146*; *Central National Bank vs. Stevens*, *169 U. S.*, *432*, *460*.

The case was tried very largely upon a written agreement between counsel (R. 75–124). It covered every material fact in the case but one, viz.: Whether the mortgages of the Texas Trunk Railroad Company and the decrees of the Federal Court foreclosing them embraced the property in controversy. The mortgage and decrees did not by metes and bounds, or otherwise,

specifically describe the property. The description of the property covered by the decree of January 31st, 1883, foreclosing the mortgage to the International Trust Company, so far as material here, is as follows (R. 153):

> "All and singular the *railroad* as the same now is, or may be hereafter * * * constructed, * * * including the *right-of-way*, *roadbed*, superstructure, * * * all *lands* and *depot grounds*, station-houses and depots, * * * and *property purchased*, and *to be purchased*, for the construction and equipment of said road; all the locomotives and cars, and machinery, and all kinds of rolling stock, whether then owned or thereafter to be purchased, * * * and all the franchises and the *rights* of the said railroad company, together with all machine shops, tools, implements, and including *all appendages and appurtenances* of said railroad, and the *property* of said railroad company then acquired, or which might be thereafter acquired in the State of Texas used for and pertaining to the operation of said railroad."

The description in the decree foreclosing the mortgage to the Central Trust Company was substantially the same (R. 159–160).

Whether, therefore, the mortgages and decrees embraced the property in controversy depended necessarily upon the relative situation of the railroad and the land; and this must be the case in every instance where the application of mortgages purporting to cover "after acquired" property and decrees foreclosing them are brought in question. It was necessary to adduce evidence showing this relation; and the testimony was confined to this point,—all other facts being covered by the written agreement of counsel.

Of course there was no room for dispute among the witnesses respecting the relative location or position of the railroad and the land. There was no contention that any of the property was occupied, or was capable of occupation or use, in the operation or maintenance of the railroad except the Hughes and Slaughter tract and the Mayes tract. The oral testimony, therefore, related to those tracts. The only evidence outside of the agreement of counsel and copies of the proceedings of the Federal Court in the foreclosure suit was the testimony of W. M. Johnson, W. L. Cabell, James B. Simpson, W. J. Moroney, W. H. Gaston and William Whyte. Johnson was

a surveyor employed by defendants in error and the person who prepared the maps of the Hughes and Slaughter tract and of the Mayes tract which will be found in the record, pages 124–125.

Cabell, it will be remembered, was one of the surviving directors of the railroad company, as well as a creditor interested in the scheme of defendants in error. He was one of the promoters of the railroad company and testified that he acted for it in the purchase of the two tracts in controversy. He was obviously friendly to the defendants in error, with whom his interests lay; but, nevertheless, testified in connection with many immaterial statements that the two tracts in question were bought for railroad purposes and that the company intended to use them for such purposes, but that if any portion should not be required for such purposes the same would be sold to employes (R. 131). None was ever so sold, however, and the testimony of other witnesses showed that every foot of land was necessary. Simpson was also one of the surviving directors of the railroad company who was also interested with the defendants in error. There is nothing else material in his testimony (R. 134–135).

Moroney was a member of the law firm of Dickson & Moroney, and his testimony related to their connection with this litigation; and is in nowise material to the present issue (R. 135–138).

Gaston, the first witness in behalf of plaintiffs in error, owned property adjoining the Hughes and Slaughter tract and resided in that locality, and testified to the purchase of said tract by the railroad company for terminal purposes, etc. (R. 138–140).

Whyte became superintendent of the railroad upon the appointment of the receiver in the foreclosure proceedings in September, 1891, and continued in that position until 1896, when he became receiver in the same litigation. His testimony showed the extent to which the two tracts in question had been used for railroad purposes and the necessity therefor, etc. (R. 140–147).

The testimony of these witnesses will be stated in detail and will be further discussed hereafter under another point of this argument. We mention it in this connection merely to show as briefly as possible that said witnesses testified respecting different aspects of the situation and in nowise contradictorily.

The Judge of the District Court perceived no

controversy as to the facts and was of opinion as a matter of law that none of the property, except the Hughes and Slaughter tract and the Mayes tract, was covered by the mortgages and decrees of foreclosure, but that as to those two tracts they were embraced by such decrees, and therefore passed to plaintiffs in error. See his opinion, R. 166–173. He should have, therefore, peremptorily instructed the jury to return a verdict accordingly, which was demanded by the plaintiffs in error; but counsel for defendants in error persuaded him to submit special issues to the jury. Nevertheless, because of the absence of conflict in the evidence, he instructed the jury (R. 17–19) peremptorily what their finding should be on all the material issues, which was practically the same as directing a verdict for plaintiffs in error for the Hughes and Slaughter tract and the Mayes tract, and in favor of the defendants in error for the rest of the land, and upon consideration of the motions of the parties after the verdict (R. 40) judgment to that effect was rendered (R. 40–53).

Counsel for defendants in error, however, succeeded in persuading the Judge to also submit to the jury a list of special issues prepared by them

which involved only minor contentions without effect on the general question as to the rights of the parties, and practically none of which were called for by the evidence (R. 19–23). We shall undertake later on to demonstrate absolutely that the answers returned to such questions were against the uncontroverted evidence. The District Judge properly regarded the questions as irrelevant and the answers as against the evidence and therefore ignored them and rendered judgment in accordance with the answers returned to the questions prepared and submitted by the Judge himself, and which were demanded by the uncontroverted evidence (R. 17–19). His only mistake was in yielding to the importunities of counsel to submit a series of questions which were manifestly irrelevant in view of the evidence and in not peremptorily instructing the jury to return a verdict in favor of plaintiffs in error for the Hughes and Slaughter tract and the Mayes tract, and in favor of the defendants in error for the rest of the land.

The Court of Civil Appeals failed to find or point out any conflict in the evidence. While that court reversed the judgment of the District Court, it did so only because it took a different

view of the *legal effect* of the evidence from that entertained by the District Judge; and consequently held as matter of law that the tracts of of land in controversy were not embraced in the mortgages executed by the railroad company and the decrees foreclosing the same (R. 199–209).

It is to be borne in mind throughout that the Court of Civil Appeals knew from the record before it that the Circuit Court of the United States had three times adjudged that the two tracts in question had passed out of the Texas Trunk Railroad Company by the foreclosure of the International Trust Company mortgage—once by appointing a receiver to take possession of the property in the suit for the foreclosure of that mortgage and turning it over through such receiver to the purchasers at the foreclosure sale; again by taking possession of it through its receiver in the suit for the foreclosure of the mortgage of the Central Trust Company and in turning the property over to the plaintiffs in error through such receiver upon completion of their purchase under the foreclosure sale in that case; and again by the explicit adjudication in the suit of Atkins, Receiver, vs. Campbell, et al. (R. 111–114).

It will be strange indeed if this court is found to be without power to prevent the Court of Civil Appeals from thus deliberately, if not maliciously, overthrowing decrees regularly rendered by the Circuit Court of the United States.

Now we maintain that since the evidence is wholly without conflict this court has the right to examine it and determine whether, as we contend, the Court of Civil Appeals denied due effect to the decrees of the Circuit Court of the United States under which the plaintiffs in error claim. All the evidence is brought up in the record by what, in the Texas practice, is designated a "Statement of Facts." Article 1379, Revised Statutes Texas, 1895, reads as follows:

> "After the trial of any cause, either party may make out a written statement of the facts given in evidence on the trial, and submit the same to the opposite party, or his attorney, for inspection. If the parties, or their attorneys, agree upon such statement of facts, they shall sign the same, and it shall then be submitted to the judge, who shall, if he finds it correct, approve and sign it, and the same shall be filed with the clerk." etc.

The statement thus filed becomes a part of the record on appeal or writ of error and is required to embrace all the evidence except where the parties agree that the evidence is sufficient to establish a given fact, in which event it is sufficient to state such fact without the evidence establishing it.

We are perfectly well aware that the provisions of the Seventh Amendment of the Constitution of the United States declaring that no fact tried by a jury shall be otherwise re-examined in any court of the United States, than according to the rules of the common law applies in cases of writs of error from this court to state courts (*The Justices vs. Murray, 9 Wall., 274*), and also that a writ of error, unlike an appeal, brings up for review questions of law only (*Wiscart vs. Douchy, 3 Dallas, 321*). But where, as in this case, the evidence is without conflict, and the question is, whether the judgment of the state court upon such evidence denies due effect to a decree of a court of the United States, the question is obviously one of law and not of fact, and this court has the right of review. (*Martin vs. Hunter's Lessee, 1 Wheaton, 304; Smith vs. State of Maryland, 6 Cr., 286; Chouteau vs.*

Eckhart, 3 How., 344; Cunningham vs. Ashley, 14 How., 377; Hyde vs. Booraem, 16 Peters, 169, 176; The Francis Wright, 105 U. S., 381; Republican River Bridge Co., vs. Kansas Pac. R. Co., 29 U. S., 315; Lytle vs. Arkansas, 22 How., 193; Mackay vs. Dillon, 4 How., 421, 447; United States vs. Pugh, 99 U. S., 265, 269; The Belgenland, 114 U. S., 355, 372; Sun Mutual Ins. Co. vs. Ocean Ins. Co., 107 U. S., 485, 501–503; The Edwin I. Morrison, 153 U. S., 199.)

The question in controversy in the case of *Martin vs. Hunter's Lessee*, 1 Wheaton, 304, was the title to a certain tract of land, and the case was brought to this court upon the ground that the construction of a treaty by the Court of Appeals of Virginia was involved. It was urged before this Court that it could not inquire into the title, but could simply examine into the correctness of the construction put upon the treaty by the state court, and that the judgment of the said court was not re-examinable here, unless it appeared on the face of the record that some construction was put upon the treaty. This view of the law was not sustained by the court which said at pages 357, 358, of its opinion, as follows:

"If this be the true construction of the section, it will be wholly inadequate for the purposes which it professes to have in view, and may be evaded at pleasure. But we see no reason for adopting this narrow construction; and there are the strongest reasons against it, founded upon the words as well as the intent of the legislature. What is the case for which the body of the section provides a remedy by writ of error? The answer must be in the words of the section, a suit where is drawn in question the construction of a treaty, and the decision is against the title set up by the party. It is, therefore, the decision against the title set up with reference to the treaty, and not the mere abstract construction of the treaty itself, upon which the statute intends to found the appellate jurisdiction. How, indeed, can it be possible to decide whether a title be within the protection of a treaty, until it is ascertained what that title is, and whether it have a legal validity? *From the very necessity of the case, there must be a preliminary inquiry into the existence and structure of the title, before the court can construe the treaty in reference to that title. If the court below should decide that the title was bad, and,*

therefore, not protected by the treaty, must not this court have a power to decide the title to be good, and, therefore, protected by the treaty? Is not the treaty, in both instances, equally construed, and the title of the party, in reference to the treaty, equally ascertained and decided? Nor does the clause relied on in the objection impugn this construction. It requires, that the error upon which the appellate court is to decide, shall appear on the face of the record, and immediately respect the questions before mentioned in the section. One of the questions is as to the construction of a treaty upon a title specially set up by a party, and every error that immediately respects that question must, of course, be within the cognizance of the court. The title set up in this case is apparent upon the face of the record, and immediately respects the decision of that question; any error, therefore, in respect to that title must be re-examinable, or the case could never be presented to the court."

In *Smith vs. State of Maryland*, 6 Cr., 286, which was brought to this court by writ of error to the Court of Appeals of the State of Maryland, the complainants claimed the land in dispute un-

der the State as owners of the equitable fee, alleging that it had passed to them under the confiscation acts of the State. The defendant insisted that the title of his *cestui que* trust had not been divested at the date of the treaty of peace, and was protected by that treaty. This court held that it was proper for it to consider and construe the confiscation acts of the State prior to determining the federal question of whether the treaty had been properly construed or not. In other words, the court examined the case upon its merits. At page 305, it was said as follows:

> "The point to be decided was and is, whether this be a case of future confiscation, within the meaning of the 6th article of that treaty; and, in order to arrive at a correct result in the decision of that point, it became necessary, in the state court, and will be necessary in this, to inquire whether the confiscation, declared by the state laws, was final and complete, at the time the treaty was made, or not? The construction of those laws, then, is only a step in the cause leading to the construction and meaning of this article of the treaty; and it is perfectly immaterial to the point of jurisdiction, that the

first part of the way is the most difficult to explore. Although the defendant's counsel admit, and the Supreme Court of the State may, in this particular case, have decided, that, where the confiscation is not complete before the treaty, the estate attempted to be confiscated is protected by the treaty, still, if, according to the true construction of the State laws, this court should be of opinion that the acts of confiscation left something to be done necessary to the perfection of the title claimed under them, which was not done at the time the treaty was made, we must say that, in this case, the construction of the treaty was drawn in question, and that the decision of the state court was against the right set up, under the treaty, by one of the parties.

"This leads to the consideration of the merits of the cause, which depend upon the question before stated, namely, whether the confiscation of the lands in question was so far complete by the laws referred to, that the title and estate of Ann Ottey was devested out of her and vested in the State, prior to the treaty of peace? This must depend upon the true construction of the acts passed in the year 1780, chapters 45 and 49, as it is not pretended that any proceedings were in-

stituted in the nature of an office, to complete the forfeiture of these lands, upon the grounds of alienage or otherwise."

In *Cunningham vs. Ashley*, 14 How., 377, which was brought to this court by writ of error to the Supreme Court of Arkansas, the defendants claimed the legal title to the land in controversy, while the complainant claimed that he had a paramount equitable title thereto. The court examined all the facts in the case with relation to their bearing upon the title of the parties, and at page 389 said:

> "*The facts in the case are exceedingly voluminous and complicated, but we have considered them, and the legal and equitable bearing they have upon the title of the parties.* Upon this view, we are brought to the conclusion that the entries on which the defendants' patents were issued, were void, so far as they interfere with the claim of the complainant, for the reasons stated, and that, consequently, the patents are also void. The decree of the supreme court of Arkansas is therefore reversed, and the cause is remanded to that court, with instructions to enter a decree in pursuance of this opinion."

Hyde vs. Booraem was an action for the possession of certain notes which had been executed and deposited for delivery to the plaintiffs under certain conditions. The proceedings in the court below were in accordance with the practice of Louisiana, where the suit originated, and upon writ of error from this court all the evidence was sent up with the record. After pointing out that this court was without authority to review, upon writ of error, rulings upon questions of fact and that embarrassment attended the examination of the cause on account of the manner in which the proceedings occurred in the court below, and that the same embarrassment had been encountered previously in a case from Louisiana, the court, through Justice STORY, observed (16 Peters, 176):

> "Taking this case, then, as that was taken, to be one where there is no conflict of evidence, and all the facts are admitted to stand on the record, without any controversy as to their force and bearing in the nature of a statement of facts, and looking to the allegations and prayer of the petition, and the facts stated by the judge, the question which we are to dispose of is, whether, in

point of law, upon these facts, the judgment can be maintained."

The court then proceeded to review the facts and concluded that the judgment of the court below was wrong, and therefore reversed it.

"*The Francis Wright*" (105 U. S., 381–387) came to this court under the act of February 16th, 1875, which limited the appellate jurisdiction of this court in admiralty causes to questions of law. It was a suit in admiralty upon a charter party in which the libellant sought to recover for the unseaworthiness of the vessel. The Court below had found that the loss (to a shipment of fresh beef) was caused by insufficient refrigerating apparatus and refused to include a finding that there was a leakage in the tubes and stoppage for repairs, and that the engineer had not been supplied with sufficient tools for making repairs. This court held that these were all incidental matters occupying the position of evidence rather than that of the facts to which the law was to be applied; and that they did not constitute the whole of the evidence from which the fact as to seaworthiness or not was to be determined, and that consequently they were not proper matters for review by this court, "unless,"

as the court added, "it also appears that the determination of the ultimate fact to be ascertained depended alone upon the legal effect as evidence of the facts stated." The intimation clearly is that if the ultimate fact did depend entirely upon the effect of the facts stated in the bill of exceptions this court would review them.

Republican River Bridge Co. vs. Kansas Pacific R. Co., 92 U. S., 315, came before this court on writ of error to the Supreme Court of Kansas. The contest was over a tract of land, both parties claiming under grants from Congress. The findings of fact by the trial court were held to be conclusive upon the Supreme Court, but Justice MILLER used this language:

> "In chancery cases, or in any other class of cases where all the evidence becomes part of the record in the highest court of the state, the same record being brought here, this court can review the decision of that court on both the law and the fact so far as may be necessary to determine the validity of the right set up under the act of Congress; but in cases where the facts are submitted to a jury, and are passed upon by the verdict, in a common law action, this court has the same inability to review those facts in a case

coming from a State court that it has in a case coming from a circuit court of the United States."

The Court of Civil Appeals is authorized by the Constitution of Texas, Section 6, Article V., to pass upon questions of fact and its decision thereon is final—the jurisdiction of the Supreme Court being limited to questions of law arising upon the facts found by the Court of Civil Appeals.

Mackay vs. Dillon, 4 Howard, 421-447, was brought to this court on writ of error to the Supreme Court of Missouri. The action was ejectment to recover a tract of land, and the questions presented were upon the competency and legal effect of certain testimony consisting of copies of instruments and surveys of record. This court, through Justice CATRON, said (4 Howard, 447):

> "The powers of the supreme court are limited in cases coming up from the state courts, under the twenty-fifth section of the judiciary act, to questions of law, where the final judgment or decree draws in question the validity of a treaty or statute of the United States, &c., or where their construc-

tion is drawn in question, or an authority exercised under them; and as the admission of evidence to establish the mere fact of boundary in regard to the extent of grant cannot raise a question involving either the validity or construction of an act of congress, &c., this court has no jurisdiction to consider and revise the decision of a state court, however erroneous it may be in admitting the evidence to establish the fact. But when evidence is admitted as competent for this purpose, and it is sought to give it effect for other purposes which do involve questions giving this court jurisdiction, then the decisions of state courts on the effect of such evidence may be fully considered here, and their judgment reversed or affirmed, in a similar manner as if a like question had arisen in a supreme court of error of a state, when reversing the proceedings of inferior courts of original jurisdiction,—and on this principle we are compelled to act in the present suit, when dealing with the instruction given on behalf of the defendant."

The case was reversed on the ground that the state court gave an erroneous charge upon the effect of the testimony adduced.

United States vs. Pugh, 99 U. S., 265, was an action brought in the Court of Claims to recover the value of sugar alleged to have been seized by United States soldiers and turned over to the Military Commission and sold and the proceeds paid into the treasury under the Abandoned and Captured Property act of 1864. This court considered the practice in appeals from the Court of Claims under the rule which required a "finding" by that court of "the facts in the case established by the evidence in the nature of a special verdict, but not the evidence establishing them." The Court of Claims sent up special findings of circumstantial facts showing that the property had been seized and turned over to the commission; that the commission while the property was in its possession was ordered to sell all the property in its possession not claimed or released and not required for the army, and turn over the proceeds to the chief quartermaster; that the commission sold the property for the net sum of $4,362.23; that the chief quartermaster received money at various times during the year from sales of sugar and molasses (the kind of property seized) to the amount of $33,796.23. *There was no specific finding that the $4,362.23 were paid*

over to him. The court, speaking by Chief Justice WAITE, said:

> "The ultimate fact to be determined in this case is whether the proceeds of the sale of the captured property belonging to the claimant have been paid into the treasury. No direct proof to that effect has been given, but if shown at all, it is by way of inference from certain circumstantial facts which have been established by the evidence. These circumstantial facts are set forth in the finding which has been sent here as the finding upon which alone the judgment was rendered, and as the case stands, the question we are to decide is whether those facts are sufficient to support the judgment. Confessedly, the court has found all the facts which have been directly established by the evidence. * * * If what has been found is, in the absence of anything to the contrary, the legal equivalent of a direct finding that the proceeds of this claimant's property have been paid into the treasury, the judgment is right. Otherwise it is wrong. * * * The question of practice to be settled is whether, under our rule, the judgment of the court of claims *as to the legal effect* of what may, perhaps not improperly, be called the *ultimate circum-*

stantial facts in a case, is final and conclusive, or whether it may be brought here for review on appeal. * * *

To avoid misapprehension in the future, we take this opportunity to say that we not only think such a judgment may be reviewed here if the question is properly presented, but that when the rights of the parties depend upon circumstantial facts alone, and there is doubt as to the legal effect of the facts, it is the duty of the court, when requested, to so frame its findings as to put the doubtful question into the record."

It is important to note that the Court of Claims did not find the ultimate fact, which was, whether the proceeds of the sale of the captured property belonging to the claimant had been paid into the treasury. Its findings recited the circumstances but failed to include such ultimate fact, but this court, from the circumstances thus appearing in the record, deduced and found the ultimate fact essential in the decision of the case.

The Edwin I. Morrison, *153 U. S.*, *199*, *215*, was a libel begun in the district court for damages to a cargo alleging that the vessel was not at the beginning of the voyage tight, staunch and strong and in every way fitted for said voy-

age as required. The district court found for libellant and entered a decree accordingly. The Circuit Court reversed the decree of the district court and dismissed the libel. On appeal to the Supreme Court, the decree of the Circuit Court was reversed and the decree of the District Court was affirmed. Mr. Chief-Justice FULLER said:

> "The findings that 'at the time of the contract and lading of cargo and commencement of voyage the vessel was tight, staunch, and strong, and in every way fitted for the contemplated voyage;' that 'there was no latent defect in the vessel which contributed to the injury to the cargo;' and that 'the whole of said damage to cargo was caused by a danger of the seas, and was within the exception in charter-party and bills of lading,' were findings determined by the interpretation which the law put upon the circumstances of the transaction as stated in the previous findings, and, as such open to our revision."

In Dower vs. Richards, 151 U. S., 658, Justice GRAY, in an opinion reviewing many of the cases, observed (page 667):

> "When, indeed, the question decided by the state court is not merely of the weight or sufficiency of the evidence to prove a fact, but of the competency and legal effect of the evidence as bearing upon a question of Federal law, the decision may be reviewed by this court."

And in this connection he quotes the language of Justice CATRON in *Mackay vs. Dillon*, above set forth.

It may be interesting in this connection to observe that the Supreme Court of Texas, the jurisdiction of which by express constitutional provision is limited to questions of law, does not hesitate to review judgments of the Courts of Civil Appeals (which are declared by the constitution to be conclusive upon the facts) in cases where it deems the evidence insufficient to support the judgment; and in some cases it bases its judgment upon facts not embraced in the findings of the Court of Civil Appeals, but which are contained in the statement of facts. (*Clarendon Land Co. vs. McClelland, 86 Texas, 179, 187; Bauman vs. Jaffray, 86 Texas, 617; G. H. & W. Ry. Co. vs. Lacey, 86 Texas, 246; Tackaberry vs. City National Bank, 85 Texas,*

488, 496; McLeary vs. Dawson, 87 Texas, 524, 536; Ætna Ins. Co. vs. Holcomb, 89 Texas, 404; Lee vs. I. & G. N. R. Co., 89 Texas, 583, 588; Kilgore vs. N. W. T. B. Association, 90 Texas, 139; Moore vs. Waco Building Association, 92 Texas, 265.

In *Clarendon Land Co. vs. McClelland* it was said (86 Texas, 187):

> "It is also true that the fifth section of the same act provides, among other things, that 'the judgment of the Court of Civil Appeals shall be conclusive upon the facts of the case,' but the meaning of the provision is clear. To recite the uncontroverted facts of a case demands no act of judgment in the sense in which that term is used in the statute. What is meant is that the decision of that tribunal upon questions of fact—that is to say, a question upon which there may be a conflict in the evidence—shall be final and not the subject of review in this court." * * *
>
> "We think the purpose was to empower this court not to revise the decision of the Court of Appeals upon any disputed question of fact, but to enable it to decide all issues presented for the determination of this court in the light of the pleadings, and

of every fact established either by the undisputed evidence or the conclusions of the appellate court upon the conflicting evidence."

In *McLeary vs. Dawson* it was decided that the findings of fact by the Court of Civil Appeals may be supplemented by the undisputed evidence upon questions omitted in such findings; and that both the findings and the undisputed testimony will be considered by the Supreme Court on writ of error (86 Texas, 524).

See also *Fellows vs. Northrup, 39 N. Y., 117; Whitman vs. Winchester, etc., Co., 55 Conn., 247; Morey vs. Milliken* (*Me.*), *30 Atlantic Rep., 102.*

Here we have a case in which a state court has overthrown the decrees of a Circuit Court of the United States in two distinct proceedings for the foreclosure of mortgages attended with possession of the property; and has deprived the purchasers at the foreclosure sales of an important part of the property bought by and delivered to them under such decrees. All the facts upon which this extraordinary judgment of the state court is based are brought up in a statement of facts in accordance with the state practice and are in the record before this court and are without conflict

or controversy. We respectfully submit that, under such circumstances, it is plainly the right and the duty of this court to examine the case just as it was examined upon this question in the Court of Civil Appeals, and to vindicate the decrees of the Circuit Court which the uncontroverted evidence shows have been denied due effect by the judgment of the Court of Civil Appeals.

SECOND POINT.

The uncontroverted evidence shows that the Hughes and Slaughter tract and the Mayes tract were covered by the foreclosure decrees of the Circuit Court; and by holding otherwise the Court of Civil Appeals denied said decrees due effect.

The Texas Trunk Railroad Company was incorporated November 6th, 1879, to build a line of railroad from the City of Dallas to the Gulf, at Sabine Pass, a distance of about three hundred miles. Dallas was the domicile of the company, and was the beginning point of its line. One would suppose that some ground would be required at that place for stations and terminal facilities. This seemed to be the view at that

time of the promoters of the enterprise (including plaintiff's chief witness and coadjutor, Cabell), as it appears that they proceeded almost immediately—as the deed is dated March 13th, 1880—to procure the Hughes and Slaughter tract, which, all agreed, was peculiarly suited to the purposes of the company.

The Texas & Pacific Railroad passes through the City of Dallas from east to west. The Texas Trunk Railroad was projected to run from said city in a southeasterly direction. The Hughes and Slaughter tract is 650 x 1680 feet, and it is sometimes designated as "Block 828." It lies practically at right angles with and about 400 feet south of the Texas & Pacific track in the eastern portion of the city. The map of the tract prepared by the witness W. M. Johnson, under the employment of defendants in error, is found in the record at page 124, but the witness is not clear as to when the data with reference to the improvements, etc., thereon was collected by him. Certainly it does not show all the railroad improvements that had been upon the property, since only a portion of the Y, at one time extending across the tract, is shown. It does show, however, the main track of the Texas Trunk

Railroad extending the entire length of the tract and near its southwesterly boundary.

It is clear that the construction of the Texas Trunk was commenced at a point upon the Hughes and Slaughter tract, or at the connection with the Texas & Pacific about five hundred feet northwesterly, and was projected thence southeasterly toward the ultimate destination of Sabine Pass. It was the beginning point of the line—the headquarters of the enterprise. It was the only land that the company acquired, or has ever owned in the City of Dallas. The only other land any where in the vicinity that the company ever owned is the Mayes tract, which is about three miles distant from the present corporate limits of the city, and consequently more than that distance from the Hughes and Slaughter tract, which is now in the city.

Aside from the existence of the main track of the railroad company, side-tracks, the Y and certain other improvements, and of the very strong circumstantial evidence, the only direct evidence of the purpose of the company in purchasing this tract is the testimony of defendant in error's witness, W. L. Cabell, and of plaintiff in error's witness, W. H. Gaston (R. 130–133). Cabell was

one of the incorporators of the company, and testified that, being its land commissioner also, he purchased the tract in question for it. His testimony respecting the purpose of the company in purchasing the land is as follows, (R. 131–132):

> "*We bought the twenty-five acres for railroad purposes, laying down switches, and such things as that, and if the land was not required, to sell it into lots for the employees to live on. All that was necessary for the tracks and switches was to be used for that purpose.* When said twenty-five acres was purchased it was the intention of the company to use whatever was necessary on the west side of the tract for tracks and switches, and the land on the east side of this was intended to be laid off into lots, and let the men employed by the railroad purchase them and build residences on them in order to be close to their work. That was the intention of the road, and *at the same time they were to use all that was necessary for switches and tracks and such things as that.* There was an old well on the 25 acres tract when we purchased it. All the land east of the well was to be sold off into lots. That was the understanding between us. That was our idea."

Thus it appears from testimony of this witness—obviously hostile to and interested against plaintiffs in error—that this tract was bought for terminal purposes, and that while such portions of it, if any, as should not be required for such purposes might be sold, yet "*all that was necessary for the tracks and switches was to be used for that purpose.*" Neither this witness nor any other ever testified, nor is there a word of evidence intimating that any portion of the tract was found by experience to be *unnecessary* for the purposes of the company. On the contrary, following up the testimony of this witness that all of the tract, if necessary, was to be used for railroad purposes, defendant in error's witness, Johnson, over the strenuous objections of their counsel, testified that *all* the tract, and *more too*, was needed (R. 127–128).

In answer to the question (R. 127) whether, if the railroad had been constructed as provided in its original charter, the twenty-five acres would have been necessary for the use of the company for terminals, yards and other railroad purposes, he testified:

> "*Yes, the company would need that twenty-five acres, or some other twenty-five acres contiguous. They ought to have forty acres.*"

In answer to the question whether the property was favorably situated for handling their connections with other railroads, etc., he answered:

> "I consider that a very convenient point; it is reached by several streets, and it is within reach of the connecting lines of railroads—the Santa Fe, the Central and the T. & P." (R. 127).

In answer to the question whether, as the railroad existed in 1888, that is, consisted of a line of fifty miles in length, if it were maintained in the average condition of other Texas railroads and had its own stations, terminals, shops, etc., in Dallas, instead of renting from others, the twenty-five acre tract in question was reasonably necessary, the witness answered:

> "*Yes, sir, I think they would have needed it. It would have given them conveniences which they would not have had on a narrower or smaller piece of land. There would have been warehouses for different branches of business, and machine shops, and turn-outs, and water stations, and depots, and other things, and I think the twenty-five acres would have been required for legitimate railroad purpurposes.*"

The same witness further testified (R. 129):

"There is no twenty-five acres of ground unoccupied in the city of Dallas better situated for the use of the Texas Trunk except Gaston's ground. They could have picked out twenty-five acres there adjoining it. Nothing nearer town was available. In my direct testimony, as to the amount of ground covered by the tract I only alluded to the end of the ties, and twelve feet between the tracks. They did not need this Mayes tract for depot purposes, but it would have helped them to put the track in better condition as ballast."

William Whyte, superintendent from 1891, and afterwards receiver of the road, testified respecting the necessity of the land for the purposes of the company as follows (R. 141):

"Q. Assuming that the Texas Trunk railroad takes care of its own engines, has its own round-house and engines, and its own yard and facilities, what do you say of the necessity of the twenty-five acre tract for the use of the company instead of using other companys' yards and facilities?"

To which he answered:

"A. *The ground would be absolutely necessary to have terminals; you could not get*

along without them; all of it would be necessary as it now stands. If the road were extended over the route called for by its charter from Dallas to Sabine Pass, with a branch from some point on its main line to the Sabine river, this twenty-five acres would not be enough."

And again (R. 142):

"Q. If the Texas Trunk should be put in the average condition of other Texas roads, state whether or not all of the tract would be necessary for it.

A. *All of the tract would be necessary, and more.*"

All this testimony respecting the *necessity* of the tract for railroad purposes was, as already indicated, wholly undisputed. Some of it came from the other side. As further proof of the intentions of the company and of the necessity of this tract for its purposes the testimony of Cabell representing what he designates as the "flat iron" tract is significant (R. 130). That was a tract occupying the space—about 400 feet—between the northwesterly end of the Hughes and Slaughter tract and the Texas & Pacific railroad and was owned by W. H. Gaston. Cabell testified that about the time of the purchase of

the Hughes and Slaughter tract the company contracted for the purchase of the "flat iron" tract from Gaston and intended to put on that tract machine shops, etc. The alleged "contract" does not appear to have assumed any definite form, or to have ever been expressed in writing. At any rate, the company paid Gaston nothing for the land, and consequently failed to get it, as Gaston never conveyed it, or otherwise gave them any right to it (R. 139). Doubtless the testimony of Cabell respecting the intended use of the "flat iron" tract was offered to show that it, rather than the Hughes and Slaughter tract, was intended for terminals, etc. This purpose, however, failed, not only because the company did not acquire the "flat iron" tract, but also because Cabell testified distinctly, as already stated, that the Hughes and Slaughter tract was purchased for terminal purposes as far as necessary. The failure to get the "flat iron" tract accentuated the necessity for *all* of the Hughes and Slaughter tract, and which, indeed, instead of being too much, was deemed inadequate without the other. The management was alive to the fact that extensive terminals were necessary for the line which the company was authorized by

its charter, and had in fact commenced to build. W. H. Gaston, who owned the "flat iron" tract, testified as follows (R. 138):

> "I have resided in Dallas thirty years. I am acquainted with the twenty-five acre tract bought from Hughes and Slaughter. I have known that land from 1879. I know something about the purpose for which that land was bought by the railroad company. I was encouraging the construction of the road and wanted to see it built. I talked with Mr. Henderson, who is now dead, and with General Cabell and others. They seemed to be the active men in it. I own land in the neighborhood of this twenty-five acres. I also owned this twenty-five acres at one time."

In answer to the question,

> "Do you know from circumstances coming to your knowledge at the time, what the twenty-five acres was acquired for by the Texas Trunk Railroad Company?"

The witness said:

> "I know what Henderson told me. *He wanted it for terminal purposes.*"

Continuing, the witness testified (R. 139):

> "*I know that Henderson was also trying*

to acquire other lands for the Texas Trunk Railroad Company for terminals; he wanted more. * * *

"*Henderson said he wanted to buy all told out there forty-five or fifty acres of land.* There were twenty-five acres in the Hughes and Slaughter tract, and I suppose about eight acres in the other land occupied by the railroad (Map and Record, p. 129), but to which they did not get the deed for. That would make thirty-three acres, and it would take seventeen acres more to make fifty acres. It is my recollection that in addition to the twenty-five acres, and in addition to this other land, he wanted seventeen acres more. None of the land was platted. Henderson wanted part of the flat-iron tract any way."

Henderson was general manager and chief engineer of the road, and was of course the man to select and plan the terminals, etc.

Respecting the purposes of the company in purchasing the Mayes tract, Cabell testified that it was the same—that is "the railroad used whatever was needed for tracks and sand, and the balance was to be divided up into lots."

There was no direct testimony to show ex-

actly the extent to which improvements were placed upon the property when the construction of the railroad was commenced. Cabell and Simpson were the only witnesses connected with the road at that time, and they did not attempt to testify to such facts, and evidently did not know or remember. But, at any rate, the main track of the railroad was constructed across both tracts, as were side tracks also. There were also on the Hughes and Slaughter tract railroad tracks connecting the Texas Trunk with the Gulf, Colorado & Santa Fe and other railroads. There was a small shop building, an engine house, a ticket office, and a water tank, at least placed upon the property. There was also a "Y" for turning engines and trains which extended almost entirely across the tract. Only one arm of the Y was there, however, at the time the map was made. Defendant in error's witness, Johnson, who prepared the map, was not acquainted with the property until after these improvements were placed thereon, and had no occasion to observe it, particularly as he was not connected with it until called upon to make the surveys on which said map was based. He testified in substance in his direct examination

(R. 124–129) that he had surveyed the two tracts in question in 1891 in connection with the proceedings commenced to forfeit the charter of the company, and again in 1895 at the request of defendants in error, and that the two maps found in the record (pages 124–125) correctly showed the railroad tracks and structures existing at the times of his examination. He was not certain, however, whether the maps were made from the survey of 1891 or the survey of June, 1895; that he did not know when the Y was built, but he found it there in 1891 in the condition shown on the map. He did not know when the connecting track with the Santa Fe Railroad was put in. The balance of the land, except as shown on the maps, had been vacant since 1890. The 510 feet of track shown on the map once forming part of the Y and the connecting tract with the Santa Fe had been taken up during the Dillingham receivership, and at the time of the trial there was no railroad property on the twenty-five acres except the main track and parallel siding. The twenty-five acre tract was not used as a terminal at the time of the trial. Since the road went into the hands of Dillingham, as receiver, a connection from the main

track below town to the H. & T. C. R. R. had been put in, and the Texas Trunk had been using the stations of the latter road. The Texas Trunk Railroad once had on the twenty-five acre tract a little box ticket office about twelve feet square, a car shed about sixty feet long and twenty-five feet wide, and a water tank holding about twelve hundred gallons. He did not know when these buildings were put on the property, but it was early in the existence of the railroad. The ticket office was worth about $25, the car shed about $50, and the tank about $75, or $100. These, with the tracks above mentioned, were all of the improvements of a railroad character ever on the property. The tracks on the Mayes tract are correctly shown on the map, page 125. The railroad company had been in the habit of taking sand from the Mayes tract, and in 1895, it had used about three acres for that purpose. It had never been used for any other purpose.

On cross examination he testified (R. 126):

> "I think the map represents the conditions existing in 1891 and 1895. It takes two horns to make a Y, but only one horn is shown on the map. I think the other horn

was once there. In addition to the two horns the Y needs a tail to get it on to the main track. This Y never had a tail when I saw it. The tail ought to run about 100 feet; that is, enough to change the engine and passenger cars; they did not run the entire train on the Y. The Texas Trunk only had one passenger car. Assuming that this Y had a tail 100 feet long, it would bring it to within about 75 feet of the northeast boundary line of the twenty-five acres. The north end of the Y would reach the main track about 600 feet from the south end. The first I knew of the car-shed on the property was in 1891. I was not familiar with the property before 1891. The tank was used to water locomotives and trains. There was wood brought in on the cars and stored there along the track. Ever since I have known the road it has been conducting a wood business. They run wood cars on that side track there, and unloaded them. Fourteen cars could be put there on the side track. They did not have but one train on the railroad at that time; fourteen cars and the engine. The connecting track with the Santa Fe railroad was there when I made this survey. The Texas Trunk railroad never owned any land in

the City of Dallas except this twenty-five acres."

The only other witness who testified as to the use of the property was plaintiff in error's witness, Wm. Whyte, who became superintendent of the road in 1891, and was afterward receiver. His testimony upon this point was as follows (R. 141–142):

> "When I first became connected with the road there was a small depot on the twenty-five acre tract, I think twelve by fourteen, not now in existence. There was a sand-house for drying sand and a blacksmith shop and an oil and waste house, and some small temporary buildings. I don't remember now the extent of them; we used these improvements at that time. That is all I had to do with when I started; we used that land as our terminal up to February, 1892, when when we connected with the H. &. T. C. There was no car-shed on the property when I first became connected with it. There was a foundation for a two-stall round-house—it was not a round-house, but a square house, but is termed a round-house. There was a foundation, wooden walls put down, and this drawing on the map (Record 124, 125) has

no resemblance to anything that was on the ground when I took charge of it. This little office and water-tank on the map is about correct as to location. My recollection is there was a complete Y on the property when I took charge. A Y has two curves and a stem. I cannot well locate on the map the other leg of the Y because the leg of the Y on the map is not located to suit; it was farther south. The stem of the Y was seventy-five or one hundred feet long, as well as I recollect. Both prongs of the Y connected with the main track of the Texas Trunk. I guess that the stem of the Y terminated about 150 feet from the north-east boundary of the twenty-five acres. I took that Y up. I used it about four months before it was taken up. I think I took it up in March, 1892, after I commenced running to the H. & T. C. terminals. I took it all up; no part of it is there now. The reason I took it up is because I had no iron to make repairs with on the main line and I had to have something, and as soon as I could dispense with it I took it up to make some repairs on the main line. The main line runs across that twenty-five acre tract. We have done switching over there to quite an extent. I suppose an acre and a half of it,

perhaps, was used for switches, and during the fair we would run passengers up there as convenience—to let them off near the fair grounds. It has been in continual use during the receivership to the extent indicated. The twenty-five acres has been used to unload freight on to some extent, and I have been fencing part of it to keep trespassers off, and I have been looking out for the property.

"We have been hauling sand from the Mayes tract for the last six or seven years to repair the roadbed, and for surfacing it and keeping it in order; it was necessary for that purpose. I presume about two acres of the land was used up to March 16th, 1896. There is no other place on the road where we could get sand to ballast the track except off the right-of-way. This Mayes tract is necessary for sand to ballast our track. I do not know how we could get along without it exactly."

It appears that the company used at different times the station facilities of other lines in Dallas—first the Texas & Pacific, next the Gulf, Colorado & Santa Fe, and finally the Houston & Texas Central. Such use, however, was under mere temporary arrangements, terminable

at the pleasure of either party. Defendants in error have dwelt upon this as evidence that the lands in question were not needed, or that the company did not intend to use them for railroad purposes. The unsoundness of such contention is apparent. The reason why facilities were rented from other lines temporarily, and why stations, yards, and other terminal facilities were not constructed on the property in question is obvious enough from this record, viz.: The chronic financial disability of the company, resulting largely from the litigation in which it was always involved.

Following the purchase of the Hughes and Slaughter tract in March, 1880, and the Mayes tract in February, 1881, the property of the company went into the hands of a receiver in December, 1881, and was sold upon the foreclosure of the International Trust Company mortgage in 1883. Certainly there was little time or opportunity for erecting permanent stations and other terminal facilities between the acquisition of the property and the receivership. Again, the purchasers at the foreclosure sale in 1883, seem to have been lacking in necessary means, for they defaulted in complying with the orders

of the court requiring further payments, and, as a result, the property was resold in 1885, to Schneider and associates. In October, 1886, the seizures and sale under various dormant judgments was made to E. M. Powell and associates (R. 106–111) and a cloud was thus placed upon the property, which was followed by suits in behalf of Powell and associates for its recovery. In 1889 the state proceeded against the company to forfeit its charter, which resulted in a decree of dissolution in September, 1891, a few days after the appointment of a receiver in the foreclosure proceedings, which resulted in the sale to plaintiffs in error.

In view of this history, it is not surprising that permanent stations and other terminal facilities were not erected upon this property, or that the company was forced to rent such facilities from other lines in Dallas. The only surprise is that it held the land through all its financial distress for the purposes originally intended.

What more conclusive evidence could there be that both these tracts of land were absolutely neccssary for the purposes of this company, if it were ever to accomplish the objects intended in its incorporation, or even to be a

railroad of any respectability, than the fact that it never sold, or never offered for sale, a foot of the land? Cabell testified that in purchasing it was intended that so much of each tract as was not needed should be divided into lots and blocks and sold. What better evidence that *all* of each tract was needed than that neither was ever subdivided into lots or blocks, nor a particle sold, or offered for sale, when all similar property in the neighborhood was being bought and sold and rapidly improved?

The foregoing is the substance of all the material testimony bearing upon the question as to whether, by reason of the uses to which the property was put, the intention of the company in purchasing it or the necessity of it in the use and operation of the road, or the situation of it with reference to the railroad, it was embraced in the decrees of the Circuit Court of the United States describing and directing the sale of the property covered by the mortgages thereby foreclosed. All other facts were covered by the written agreement of counsel (R. 75–124). The testimony of the witnesses Simpson (R. 134) and Moroney (R. 135), the only other witnesses not discussed in this connection, has no bearing whatever upon this question.

And, as we have so often said before, the evidence is wholly without controversy. This, we feel sure, opposing counsel will not deny.

On this testimony, the judge, upon the ground that the evidence was not conflicting, directed the jury to make the following finding as to the Hughes and Slaughter tract (Record, p. 18):

> "We, the jury, find that the 25-acre tract described in plaintiffs' petition as tract No. *b*, was bought by the Texas Trunk Railroad from Hughes and Slaughter, the deed is dated March 8, 1880, but was not delivered until several months thereafter, but during the year 1880, at the time it was purchased, it was the purpose and intention of the railroad company and its officers to construct on it the main track of said railroad, part of the sheds of the railroad and whatever switches and side tracks should be necessary in the operation of the road, and if these did not occupy all of the land then to sell lots on the eastern side of the land to its employees so that they might be near their work; no such sales have ever been made, nor has any part of the land been subdivided into lots; the railroad built its main track across the land near its western boundary, and also built a side track on it

and a Y near the center of it extending eastwardly across the land to beyond the center of the land and also a small house used as a ticket office and carshed; it used in the operation of its road up to 1892 the main and side track and houses; this was the only land the road owned in Dallas where it terminated; both as originally contemplated and as actually constructed, if the road had been properly constructed and operated it would have needed as much as 25 acres for terminal facilities, such as switches, sheds, etc., and such would have been the usual and proper amount for such purpose of such construction and operation.

K. J. KIVLEN, *Foreman.*"

The jury were also instructed to make the following finding as to the Mayes tract (Record, p. 19):

"We, the jury, find that the 11-92/100-acre tract described in plaintiffs' petition as tract No. *d*, was bought by the Texas Trunk railroad from Mayes and wife on February 2nd, 1881; it had on it sand; at the time of its purchase it was the purpose and intention of the railroad company, and its officers, to use the sand in the construction and ballasting of the road-bed, and also to place on it

such switches and side tracks as might be necessary in the operation of the road; the main track of the road was built across it near its eastern boundary, and also a spur track running out from the main track (but near to it) across the land so as to reach the sand; sand has since been taken from the land and used in the construction and repairing and ballasting the road; the road has occupied about two acres of the tract; if the road was properly constructed and operated it would be necessary to use sand in order to do so properly and successfully.

K. J. KIVLEN, *Foreman.*"

The foregoing findings being by direction of the court, and upon the material questions in the case must be deemed to be controlling. If there is any inconsistency between these findings and any special issues found by the jury at the request of plaintiffs' counsel, the findings by direction of the court would seem to be the findings which should govern, or else the two findings nullify each other, and the jury failed to make any finding upon the question.

If the findings of the jury, which we have quoted, are to be deemed the findings in this case, then our position is, that this court has the

right to examine and consider the facts thus found, and say whether as a matter of law, upon these facts, the land in question was embraced by the mortgages executed by the railroad company and the title thereto acquired by the plaintiffs in error by reason of the various decrees of the Federal Court for the Northern District of Texas.

Now we maintain that the uncontroverted evidence establishes the following facts:

1. Both tracts of land were bought by the company for railroad purposes.

2. If the road had been constructed as originally contemplated, both tracts of land would not only have been necessary, but would have been insufficient for the purposes of the company.

3. Irrespective of the line as originally contemplated, but considering it as it was actually constructed and as it stands to-day, if it were properly operated and maintained, and if it had its own shops, stations, yards and terminals, instead of renting them at the will of other lines, both tracts were and are absolutely necessary.

4. The main track of the road was originally constructed across both these tracts of land, and has ever since been used and operated thereon,

and so stands to-day. When the mortgages were executed the company had a passenger station, a car and engine shed, a water station, several side-tracks and a "Y" on the Hughes and Slaughter tract. The main track was constructed across that tract its entire length near the western boundary. The "Y" extended (with its center of course practically at right angles with the main track) almost entirely across the tract—that is, with its "tail," or stem within about 175 feet of the northern boundary, as shown by the testimony of plaintiffs' witness, Johnson, and within about 150 feet of it, as shown by the testimony of Wm. Whyte. It had been taken up when the maps in the record were made by Johnson. The map shows only one prong. Assuming that the northeast end of the prong, as shown on the map, was where the other prong connected with it, and adding to that a stem of 100 or 125 feet in length, which it must have been, as shown by the witnesses, the court will see that it extended practically across the tract.

5. The Mayes tract is crossed by the main track of the road, and side-tracks are laid upon it for the purpose of taking out sand to be used in maintaining the road in the "black land"

country through which it is constructed. About three acres of the tract had been used for that purpose, as shown by Johnson's testimony, when he examined the road first in 1891. Both Whyte and Johnson testified that the Mayes tract was necessary to the company for the purpose of affording sand required in maintaining its track.

6. *The Texas Trunk Railroad Company never owned, and does not now own, another foot of land in the City of Dallas except the Hughes and Slaughter tract.* If that is held not to pertain to the railroad, or not to belong to the owners of the railroad, then it owns no other ground in the city, or nearer to the city than the Mayes tract—a distance of about three miles—upon which to construct stations, terminals, etc., though its line terminates in that important city.

7. Though both tracts of land were bought by the company in 1880, twenty years ago, and though all the land surrounding the Hughes and Slaughter tract was years ago platted and sold as city lots, and is now thickly settled, no part of the tract has ever been platted or sold, or offered for sale, but has been held for railroad purposes, and has been regarded apparently by

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every one except the plaintiffs as necessarily and properly held for the use and legitimate purposes of the railroad company in connection with its road.

8. In the sale of the property under the contractor's judgment in 1885, against the company, as reorganized by the purchasers, at the sale under the International Trust Company mortgage, the two tracts of land in controversy were levied upon and specifically described, and were ever afterward claimed by the company organized by the purchasers at such sale, and which executed the mortgage to the Central Trust Company.

It is important in this connection to consider the requirements of the law as settled by the Supreme Court of Texas respecting the sufficiency of descriptions of property sold under judicial process in that state. In *Smith vs. Crosby, 86 Texas, 15*, Chief Justice STAYTON said, (pages 21–22):

> "The law does not require that in such sales the description must be such that the land may be identified by inspection of the levy and deed; and if the description be general, but sufficiently accurate to enable

parties to identify the land levied upon and conveyed, by the use of such means as would be admissible in a court of justice for that purpose, then the description should be deemed sufficient. * * *

"If the general description be accurate, and such that, following and applying it, purchasers, by the use of that diligence and care usually exercised in examining title and ascertaining the value of land they contemplate purchasing, may ascertain what particular land or interest in it is offered for sale, can it be said that such persons have not present means of knowing what is offered for sale?

"Can it be said, when land or interest in it is so described, that bidders have not means of informing themselves of its value?"

The court quoted with approval (page 24) the language of this court in White vs. Luning, 93 U. S., 514, 523, as follows:

"The policy of the law does not require courts to scrutinize the proceedings of a judicial sale with a view to defeat them. On the contrary, every reasonable intendment will be made in their favor, so as to secure, if it can be done consistently with

legal rules, the object they were intended to accomplish."

Prospective bidders and the public would have undoubtedly understood from the decrees under consideration (R. 153, 159), that all and singular the Texas Trunk Railroad, including the right-of-way, roadbed, all lands and depot grounds, station houses and depot, materials and property purchased and to be purchased for the construction and equipment of the road, all machine shops, and all appurtenances and appendages of said railroad and property of said company theretofore acquired, or which might be acquired in the state of Texas, used and pertaining to the operation of said railroad, was to be sold at the time appointed. In the same case the court further said (86 Texas, 23–24):

> "No prudent man, contemplating the purchase of land at sheriff's sale under execution, relies upon the levy or proposition of the sheriff to sell, in determining what part or interest in a tract of land, sufficiently described in a levy and offer to sell, he will acquire right to under a purchase; nor can he claim that it is the duty of the creditor to exercise a higher degree of care for his

benefit in directing the levy than self-interest will induce the purchaser to exercise for his own protection. The purpose of advertisement is not solely to give notice of the time and place the sale will be made, but is also to afford persons desiring to purchase an opportunity to examine title and to determine for themselves what land or interest in land they can acquire by purchase."

And in the later case of *Herman vs. Likens*, *90 Texas, 455*, the same court used this language:

"But to bidders in general, who have no special knowledge of the facts, the deed can never convey a precise idea of the land itself. Even if field notes be given they must search for the land upon the ground or have the boundaries pointed out to them. So if it be a lot in a town or city the map must be referred to and applied to the ground, or the lots be in some manner designated by some one who is familiar with the locality."

Any person who contemplated the purchase of this property at foreclosure sale would have done as the court in those cases said he should do. After reading the notice he would have probably inquired as to the number of miles of railroad

then constructed and in operation, and would have doubtless examined them. The next, if not the first, inquiry occurring to him would have been as to the company's terminal facilities at Dallas. He would have found, upon examination, that the main track of the road was constructed across both of the tracts of land in question, and that both were being used to some extent at least for railroad purposes. He would have observed that the Hughes and Slaughter tract was otherwise vacant; that the company had no other stations or buildings and no other terminals and no ground upon which to construct them; that this land was well adapted for terminal purposes, and that there was no other suitable land available. If he was expecting to purchase at the sale under the International Trust Company mortgage, he would have found the property extensively used at the time for terminal purposes, and that while the structures were inadequate and insufficient, he would have attributed this to the fact that the construction of the road had just been commenced, and that, instead of spending its funds for extensive terminals at the outset, the company had expended its means in extending its line—deferring terminal improve-

ments until there was more need for them and more need for building them in a substantial manner. He would have ascertained, upon inquiry of the officers of the company, that this land was bought for terminal and other railroad purposes; that while it might have been expected at one time to sell a portion of it to employes he would have found that this was based upon the expectation of owning the "flat iron" tract, which was never acquired, and that, in the judgment of the officers, all of the twenty-five acres was therefore necessary and had been held accordingly. If intending to purchase at the foreclosure of the Central Trust Company mortgage, he would have found the same facts existing in a great measure, except that the facilities of the H. & T. C. R. Co. were then being temporarily used without cost, etc.; and he would have also found that just a few weeks before the Federal Court had determined, in the case of Atkins, receiver, vs. Campbell, et al., that the property was covered by the mortgage under foreclosure and would go to the purchaser at the sale. With reference to the Mayes tract he would have found the same facts except that it was intended to furnish and was furnishing sand to be used in ballasting the

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road, the necessity for which would have been fully demonstrated to him if he had taken, as he doubtless would have attempted to do, a trip over the road before bidding.

At the time of either sale an examination of the records or a visit to an abstractor's office would have disclosed to him that *the Texas Trunk Railroad Company did not own a foot of land in the City of Dallas except the 25 acre tract.* From this he would have at once concluded that it appertained to the railroad, irrespective of other information, for he never would have supposed that a railroad company, constructing a railroad from a point in the city of Dallas, and owning twenty-five acres of land crossed by its main track and admirably adapted to the uses of the company, would have sold, or intended to sell, or devote the property to some town lot scheme, leaving itself *absolutely without a foot of ground for stations, shops, yards, terminals and all the facilities demanded at the terminus of a railroad line in such a city.*

If *land* is being sold, of course it must be described as *land* and so that it can be identified by some of the methods employed in locating and identifying land. If property is being sold as a

railroad and its appurtenances, of course it is to be described as such. A "railroad" consists of many elements—of rails, ties, spikes, main track, side tracks, stations, shops, structures of various kinds, right-of-way, grounds for section-houses, stations, etc. The only purpose of description is to indicate and provide means to identify the property sold. Whatever accomplishes this purpose is, we submit, sufficient. According to plaintiff's contention, if carried to its logical result, even the right-of-way was not covered by the mortgages and decrees because it was not described by metes and bounds, or so that it could be identified by an inspection of the mortgages and decrees. The absurdity of such proposition appears from its mere statement.

The strange mistake of the Court of Appeals in holding that the property in question was not covered by the mortgages and forclosure decrees is explained by the fact that it was based upon a decision which had been overruled. When it came to apply the law to the case (R. 207–208) the court quoted from *Shirley vs. Waco Tap Ry. Co., 78 Texas, 131, 136*, in which the opinion was prepared by the Commission of Appeals, as follows:

"The authorities are abundant to the effect that, whether subsequently acquired property is included in a conveyance executed by a railway company depends upon its being necessary to the enjoyment of the franchise or the operation of the road in the absence of special description of it in the conveyance. So a conveyance of all its property, real and personal, acquired or to be acquired, owned or to be owned, used or appropriated for operating and maintaining the road does not include lands acquired by the company and not thus used or employed."

The Court of Civil Appeals then adds:

"Applying the rule here announced that the after acquired property to become subject to mortgage must be "used or employed," then the evidence warrants the conclusion that the International Trust Company mortgage did not embrace the land sued for."

Shirley vs. Waco Tap Ry. Co., was in effect overruled by the Supreme Court of Texas in *Quinlan vs. H. & T. C. Ry. Co., 89 Texas, 356.* But, even if the Shirley case be the law, it was misapplied by the Court of Civil Appeals in this case. As a matter of fact the Hughes and

Slaughter tract was acquired *before*, and not *after*, the execution of the International Trust Company mortgage. It was alleged in plaintiffs' petition, subdivision "(*b*)" (R. 2) that the property was conveyed to the company by deed dated March 13th, 1880, and the parties agreed in writing that this allegation was true (R. 75–76). Defendants in error offered to prove by Cabell, and by certain documents in connection with his testimony, that the final consideration was not actually paid until September, 1880, but such evidence was ruled out by the court (R. 131) and could not be considered by the Court of Civil Appeals as evidence in the case. The mortgage to the International Trust Company was dated March 22nd, 1880,—some days after the date of the deed conveying the property to the company.

But if it be conceded that the property was not acquired until after the mortgage was executed, surely it cannot be the law that it was not subject to mortgage by the company until it had been put into actual use. The company had just been organized and was only about beginning the construction of its road. It certainly had the right to buy property needed for terminals and other uses in connection with the line

to be constructed. The fact that several months might elapse before said property would be put into actual use certainly would not prevent it from being covered by a mortgage embracing, as the mortgage to the International Trust Company does, "the railroad, the right-of-way, all lands and depot grounds and property purchased and to be purchased for the construction and equipment of the road," etc. (R. 79–80).

The effect of the decision of the Court of Civil Appeals, as applied to the facts of this case, is that a railroad company may not mortgage any after-acquired property unless such property be necessary "to the enjoyment of the franchise or operation of the road," as held in the Shirley case; and unless the same be also actually "used or employed," as held by the Court of Civil Appeals in this case. In other words, no matter if the railroad company executes a mortgage upon everything it owns and afterward acquires in terms as broad and sweeping as they can be made, such mortgage will not extend to any after-acquired property unless the bondholders are able to assume and sustain the burden of proof that the after-acquired property was necessary in the use of the road, and, further, accord-

ing to the decision of the Court of Civil Appeals, that it was actually *used* or *employed* in the operation of the road.

Of course it is impossible to "specifically describe" (if by that is meant description by metes and bounds, or such other descriptions as are usually given in deeds) lands, etc., not acquired until after the mortgage is made. So the effect of the decision in this case is to hold that no valid mortgage can be executed upon after-acquired property of a railroad company unless, before the claim of some other person intervenes, the property is actually brought into use in the operation of the road. Certainly such is not the law. As we understand the decision in the Shirley case, first cited, and of the Court of Civil Appeals in this case, they make it a question of power to mortgage, and yet under the statutes of Texas the power of railroad companies to mortgage is co-extensive with their power to own property, and certainly railroad companies are not limited in the right to acquire to that absolutely *necessary* at the *very time* it is acquired. A tract of land may not be necessary to the actual construction of the road, the running of trains or operation of the road generally,

yet it may be used to increase the facilities afforded to the public to economize the expenses of operation and maintenance, etc., and if so, we submit that if actually acquired for that purpose and in good faith intended to be so used, it would be covered by a mortgage in the terms used in the mortgage in question in this case. The view adopted by the Court of Civil Appeals limits railroad companies to the property actually necessary under conditions existing at the time the mortgage was executed, cutting off all right to acquire land demanded by the road when finally completed, as contemplated by its charter, or for the improvement of facilities for the public, the cheapening of the cost of maintenance and operation, and for the increasing demands of growing population and traffic. The unreasonableness of any such rule is well illustrated by the facts of this case, in which the Court of Civil Appeals has in effect held that a railroad company without a foot of ground in one of the largest and perhaps the most thriving cities in the state and the terminus of its line, cannot hold or mortgage as a part of its road a piece of ground that the uncontroverted testimony of all the witnesses shows is necessary for terminals, yards and

other facilities, and which is adapted to that purpose.

The mortgage to the International Trust Company includes "all appurtenances and appendages of said road and the property of said company now acquired, or which may be acquired in the State of Texas, used for and pertaining to the operation of the railroad." It seems abundantly clear from the evidence that the property here in question was "used" for and "pertained" to the operation of the railroad. But the mortgage here also covered "all and singular the railroad," which would include the right-of-way and other real estate appertaining to it. More important still, it included "all lands and depot grounds, station houses and depots." This included something more than the right-of-way; and effect must be given to the words. The property in question is certainly "lands," and there is no question under the evidence that it is also "depot grounds." The mortgage also covered "property purchased and to be purchased for the construction and equipment of said road." There is no room for doubt under the evidence that this property was purchased for the construction and equipment of the

road—not merely as a place on which to lay the track, but for use as terminals and for other facilities required in the proper construction and equipment of the road. It also covered all "machine shops," whether then owned or thereafter acquired, and which of course would include the ground for the same.

We observe now what is perhaps the most remarkable feature of this case. Defendants in error sued for *all* the Hughes and Slaughter tract and for *all* the Mayes tract—describing each by metes and bounds (see their petition, subdivisions "(b)" and "(d)", R. 2–3). At the close of the evidence they filed (R. 150) an admission and disclaimer as to the *railroad* "embracing the ground actually occupied by its tracks and structures used for railroad purposes, and a right-of-way fifty feet in width on each side of the center of its main track as constructed on the 25 acre" Hughes and Slaughter tract, and "embracing also a right-of-way 100 feet in width on each side of the center of the main track of the said railroad where it may cross any of the other lands involved in this suit"—the Mayes tract, for instance. The Court of Civil Appeals excepted such right-of-way when it reversed the judgment

of the District Court and rendered judgment in favor of defendants in error for said tracts (R. 210-211).

There was no pretense in the evidence or elsewhere that the strip 100 feet in width across the Hughes and Slaughter tract, or the strip 200 feet in width across the Mayes tract thus excepted had been segregated by any deed, decree, dedication, survey, map or otherwise. Even the maps prepared by plaintiff's witness, Johnson (R. 124-125), did not pretend to give any such lines or contemplate any such segregation. There are no monuments to mark the lines thus arbitrarily drawn by counsel and the court. And naturally we wonder why the line was drawn at a strip 100 feet in width on the Hughes and Slaughter tract, for instance. Why not at 50 feet or at 75 feet or at 200 feet? Indeed, why not at the end of the ties? Certainly the plaintiffs in error might, with equal propriety, have recovered all except that occupied by the rails and ties, say a strip eight feet in width. There is just as much use for the rest of the tract for railroad purposes as there is for that portion of the 100-foot strip outside of the narrow space actually covered by the rails and ties.

The careful pruning and trimming of the foreclosure decrees of the Federal Court by counsel for defendants in error and the Court of Civil Appeals becomes almost ridiculous when it is observed that the disclaimer and judgment left to the railroad company a right-of-way 200 feet in width everywhere except across the Hughes and Slaughter tract, and there it was restricted to 100 feet. The Mayes tract and such country lands, if any, as should be crossed by the railroad were cheap, and therefore defendants in error could afford to allow a right-of-way 200 feet in width, although in the country there would be much less need for so wide a space than in the city. But with the Hughes and Slaughter tract located as it is in the city and being very valuable it was different; and when they came to that tract they were not quite so generous. Although there was obviously need for a wider right-of-way at the terminus in the city than in the country, yet it was restricted to 100 feet in width across the Hughes and Slaughter tract, while 200 feet in width was allowed everywhere else!

Thus it appears that defendants in error and the Court of Civil Appeals trimmed the decrees of the Circuit Court to suit their purpose,

and carved out of the property covered by them just such portions as were wanted. Defendants in error, as it were, said: "The Mayes tract and the other lands outside of the city are not very valuable. Therefore we will allow the decrees of the Federal Court foreclosing the mortgages to extend to a right-of-way 200 feet in width. But the Hughes and Slaughter tract is quite valuable and we can readily sell every foot of it. Therefore, we will only allow such decrees to extend to a strip 100 feet in width."

Now, we submit that decrees of the courts of the United States cannot thus be trifled with and trampled upon. They embrace either all of the two tracts in question or none. The court sold "all and singular the railroad * * * including the right-of-way, roadbed, * * * *all lands and depot grounds*, station houses, * * * and property purchased, and to be purchased, for the construction and equipment of said road, * * * and all the franchises and rights of said railroad company, together with all machine shops, * * * including all appendages and appurtenances of said railroad," (R. 153–159). The main track of the railroad was constructed and in operation across both of the

tracts of land (R. 124–125). There was not and had never been any division of either tract,—no survey made, or monuments set, or decree rendered, or deed executed, or maps recorded to mark the limits of any "right-of-way," or to mark out what portions should be for side-tracks and yards and what portions for freight stations and what portions for passenger stations, and what portions for shops, etc. Each tract existed as a whole—described by metes and bounds as in the deeds of conveyance, and as set forth in the pleadings and judgment; and according to the uncontroverted facts each had been reserved intact for railroad purposes and had been used and occupied for such purposes from the time of their acquisition in the early days of the enterprise to the date of the trial. Each had been possessed and used in connection with the operation of the railroad by the receivers of the Federal Court in the foreclosure suits, and each had been surrendered by such receivers to the purchasers at foreclosure sale without any question or suggestion as to divisions or subdivisions, or otherwise than as a part of the railroad plant passing under the decrees.

That the decrees of foreclosure embraced at

least a portion of each of said tracts since the main track of the railroad sold was constructed across both tracts is perfectly obvious. Even opposing counsel and the Court of Civil Appeals were bound to admit this in view of this record. Now if such decrees did not embrace all, what portion was omitted? The decrees themselves made no exception. Who is to draw the line and to fix the limits? Counsel for defendants in error have undertaken to do so, and the Court of Civil Appeals has sustained their action. Have they that power? May they, while conceding, as they are bound to do, that the decrees embraced at least a portion of the property, arrogate to themselves the right and power to restrict such decrees to a trifling portion of the property and carve out such portion as their own interest prompts them to appropriate?

We submit that since the foreclosure decrees confessedly embraced at least a portion of the tracts and do not exclude any portion, the intention was to embrace all of each, and this too without regard to any evidence showing the use and necessity of the entire tract for railroad purposes. And when we turn to the undisputed evidence showing that the company bought both

tracts for railroad purposes ; that both were used for railroad purposes according to the varying needs and ability of the company ; that no part of either was ever devoted to any other purpose ; that through all the financial distress of the company all of each tract was steadfastly held and reserved for railroad purposes, the error of the Court of Civil Appeals in sustaining the almost audacious appropriation by defendants in error of all the land, except a narrow unmarked strip which is retained by their grace, is apparent.

THIRD POINT.

The property being in the custody of the Federal Court, through its receiver appointed in the proceedings therein pending for the foreclosure of the mortgage to the Central Trust Company, sales thereof under process of other courts and by other parties in disregard of the possession of the Federal Court were void.

The Central Trust Company presented its bill for the foreclosure of the mortgage executed by the Texas Trunk Railroad Company to it, as trustee, to Circuit Judge PARDEE, September 4th, 1891, and on the same day Judge PARDEE ap-

pointed Charles Dillingham Receiver of the mortgaged property, (R. 94–95). Dillingham promptly qualified and continued to act as receiver until November 30th, 1892, when he resigned, and George T. Atkins was appointed and duly qualified as receiver to succeed him (R. 79). Atkins continued as receiver until August 5th, 1896, when he was removed by Circuit Judge McCormick, and Wm. Whyte was appointed receiver in his place (R. 103–106) and continued to act as receiver until after the rendition of the judgment against and the execution of the deeds by the trustees of the sold out railroad company, through which defendants in error claim.

The executions in the case of Thompson vs. Texas Trunk Railroad Company were issued and levied in March and August, 1895, and the sales thereunder were made in April and October, 1895 (R. 116). The judgment in Bumpas vs. Ely, et al., was rendered in April, 1898 (R. 118), and the pretended deed from the surviving directors to Bumpas was executed in December, 1897 (R. 120).

Plaintiffs in error introduced upon the trial the proceedings and the decree of the Circuit Court of the United States in the suit brought

by George T. Atkins, as receiver of said court, against E. M. Powell and associates (styled "George T. Atkins, Receiver, vs. C. T. Campbell, et al.") to clear the title to the property, and particularly to the Hughes and Slaughter tract and the Mayes tract (R. 111–114). Plaintiffs in error then specially requested the court in due form to instruct the jury that such proceedings and decree were effectual to establish and bring into custody of the Federal Court, through George T. Atkins, its receiver, the two tracts of land in question, but the request was refused (R. 36–37).

It would seem to be entirely clear from such proceedings that the two tracts of land in controversy were in the custody of the Circuit Court of the United States, through its receiver appointed in the foreclosure proceedings therein pending. The receiver was in actual possession, at least to the extent that the property was occupied by the railroad tracks (see maps pp. 124, 125) and was exercising control over and paying taxes on the property. Under the direction of that court he commenced and prosecuted a proceeding to cancel adverse claims and remove the same as a cloud upon his right to the property,

the object of which, of course, was to clear up the title to the whole property and prevent its sacrifice on account of doubt as to the title at the foreclosure sale then pending. By the decree in the suit thus brought by the receiver against the adverse claimants the court specifically and formally adjudicated that the property was in its custody. This was necessarily the result of the decree because, if it was not covered by the mortgage to the Central Trust Company and was not in the custody of the court, through the receiver in the proceeding for the foreclosure of that mortgage, neither the court nor its receiver had anything to do with it. Under such circumstances its receiver would, of course, have no right to maintain a suit to clear the title to the property, for he would have no interest therein, since the right of possession and control by the court was limited to the property covered by the mortgage under foreclosure.

Whether the property was covered by such mortgage and whether it was covered by the mortgage to the International Trust Company and the decree foreclosing the same against the original Texas Trunk Railroad Company, were issues presented, and constituted the main con-

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troversies in the suit of Atkins, Receiver vs. Campbell, and by rendering the decree in favor of the receiver (R. 112, 113) the Circuit Court definitely determined that both of said mortgages and the decrees foreclosing them embraced the property in controversy.

Whether that decree was correct is a question not now open to controversy. It was not only binding as between the parties to that suit and an adjudication between them finally respecting the title, as well as the possession, but it was also binding on all persons, whether parties to that suit or not, so far as the court's *possession* was concerned. By that decree, if not before, the Federal Court asserted its possession of the property, and, whether the possession was rightful or wrongful is not a matter of any consequence. If defendants in error, or any other persons, deemed the possession wrongful, it was their duty to apply to that court and have the question determined. They had no right to ignore the possession and proceed in contempt of it, as they did, no matter how wrongful the possession may have been. If they believed that the property was not covered by the mortgage to the International Trust Company and by the decree

foreclosing it, nor by the mortgage to the Central Trust Company, it was the duty of the surviving directors of the Texas Trunk Railroad Company, claiming title to it, to apply to the Federal Court, setting up their right to the property and ask for its possession; or it was the duty of the creditors of the original company to make such application.

We submit that the fact that plaintiffs in error were not parties to the foreclosure proceeding in which the receiver was appointed and acting does not affect the question respecting the validity of their acts in reference to the title to the property done while it was in possession of the receiver. It is well settled, of course, that where property in the custody of one court, through a receiver, is sold under process of other courts, against the defendant, such sales are absolutely void (*Wiswall vs. Sampson, 14 How., 52; Davis vs. Gray, 16 Wallace, 203; Porter vs. Sabin, 149 U. S., 473; in re Tyler, 149 U. S., 181; Edwards vs. Norton, 55 Texas, 410; Russell vs. T. & P. Ry. Co., 68 Texas, 646; Ellis vs. Water Co., 86 Texas, 109; Texas Trunk R. Co., vs. Lewis, 81 Texas, 1*).

Upon the same principle every sale sought to be made of property while in the custody of a

court for administration and distribution, and in hostility to the title there held, no matter whether under legal process or voluntarily, and no matter whether the vendor or vendee are parties to the receivership litigation or not, should be declared void.

In *Scott vs. Crawford*, decided by the Texas Court of Civil Appeals (16 T. C. A., 477; S. C., 41 S. W. Rep., 697), it appears that the owners of certain land, to secure the payment of an indebtedness, conveyed the same to a trustee with power to sell it at public auction after certain notice in case of default in the payment of the indebtedness, etc. They subsequently, and without payment of the debt, conveyed the land, or their equity in it, to a corporation. The corporation became insolvent, and its assets, including the land, were placed in the hands of a receiver. While the property was held by the receiver the trustee, in the exercise of the power conferred by the deed of trust, sold the land at public auction, after notice and in the manner specified in the deed. It thus appears that neither the holder of the notes, who had the sale made under the deed of trust, nor the maker of such notes, nor the purchaser at the sale were

parties to the receivership suit. Yet the court held the sale void because the property was at the time in the hands of the receiver. After citing the leading case of *Wiswall vs. Sampson* and quoting from the opinion therein to the effect that the title to the property in the custody of a court is bound from the filing of the bill, etc., the Texas Court said (16 T. C. A., 480):

> "If this invalidity results from the 'title being bound' when the land is placed in the possession of a receiver, as is declared by this decision, then no sale of any character, whether under a deed of trust, power of attorney, process of court, or otherwise, can affect the title in the hands of the receiver if made without consent of the court having custody thereof."

This seems to be the logical and necessary result of the principle. When a court takes possession of property through a receiver in foreclosure proceedings, it is for the purpose of preserving it pending the litigation and passing the title of the mortgagor on to some purchaser at foreclosure sale. In case of an insolvent corporation especially the proceeding is *in rem.* All persons interested in the property as claim-

ants, creditors or otherwise, are charged by law with notice of the court's possession, and any claims they may have should and must be asserted in that court. If they are allowed to ignore the court and its possession and control of the property, and traffic in the title freely and as they please, and in hostility to the title held by the court, the court will be embarrassed in the administration of the property and may be absolutely prevented from passing a marketable title.

The evil results of such trafficking in the title to property in the custody of a court is afforded by this case. The railroad company was ruined by litigation before the final foreclosure proceedings against it. During such proceedings the receiver, with the hope of removing the only known cloud upon the title, commenced the suit against C. T. Campbell and others, and prosecuted it to a successful termination. The plaintiffs in this case, however, secured control of some old judgment that had been supposed for fifteen years to be worthless; procured the issuance of executions under it against a dissolved corporation, and, without notice to the receiver of the Federal Court, or to any one

interested in the property, caused such executions to be levied upon the land in controversy, and had the same sold and bought in for a nominal consideration by an employe in the office of plaintiffs' counsel.

We respectfully submit, therefore, that in any aspect of the case the claim which the defendants in error put forward was acquired in contempt of the orders of the Circuit Court of the United States which had the property in custody through its receiver in the foreclosure suit, and such claim is therefore void.

FOURTH POINT.

The judgment of the Court of Civil Appeals for the Fifth Supreme Judicial District of Texas in so far as it awarded the Hughes and Slaughter tract and the Mayes tract to the defendants in error should be reversed.

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